STATE OF MICHIGAN

COURT OF APPEALS

JOANNE SMITH-BEDRICK and ROBERT BEDRICK,

Plaintiffs-Appellants,

v

FORD MOTOR COMPANY, W-3 CONSTRUCTION COMPANY, INTEGRATED INTERIORS, INC., and BOONE & DARR, INC.,

Defendants-Appellees,

and

FORD MOTOR COMPANY,

Cross-Plaintiff,

v

W-3 CONSTRUCTION COMPANY,

Cross-Defendant,

and

W-3 CONSTRUCTION COMPANY,

Third-Party Plaintiff/Cross-Appellant,

v

INSULATION, INC.,

Third-Party Defendant/Cross-Appellee,

and

W-3 CONSTRUCTION COMPANY,

Cross-Plaintiff/Cross-Appellant,

UNPUBLISHED
January 11, 2005

No. 245824
Washtenaw Circuit Court
LC No. 00-001278-NO

v

INTEGRATED INTERIORS, INC., and BOONE & DARR, INC.,

Cross-Defendants/Cross-Appellees.

Before: Donofrio, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting defendants summary disposition in this construction-site injury case. Defendant W-3 Construction, Inc. (W-3), cross-appeals the court's dismissal of its claims for indemnification against defendant subcontractors Boone & Darr, Inc. (B&D), and Integrated Interiors, Inc., and against sub-subcontractor Insulation, Inc., plaintiff's employer. In the principal appeal, we reverse. In the cross-appeal, we affirm the dismissal of W-3's indemnification claim against Insulation, Inc., but in all other respects, we reverse.

I

On November 14, 1997, at Ford Motor Company's Rawsonville Plant in Ypsilanti, plaintiff JoAnne Bedrick (plaintiff), a journeyman insulator employed by third-party defendant Insulation, Inc., was installing ductwork insulation when she fell approximately fifteen feet to a concrete floor below her work area. Plaintiff sustained serious and disabling injuries in the fall. Plaintiff received workers compensation benefits through her employer, Insulation, Inc. She and her husband, Robert Bedrick, brought suit against Ford, W-3 Construction (the general contractor Ford retained), and several subcontractors. The circuit court granted all defendants summary disposition on the basis that plaintiffs could not establish the cause in fact prong of proximate cause. The principal appeal is of the order dismissing plaintiffs' negligence claims.

Defendant Ford hired W-3 as the general contractor for the phase of the Rawsonville Plant construction project at issue here, which entailed installation of sheet metal ductwork, insulation of the ductwork, installation of a 12' drop ceiling and a 14' service ceiling below the ductwork. General contractor W-3 subcontracted the installation of the two ceilings to defendant Integrated Interiors. W-3 subcontracted the mechanical system work to defendant Boone & Darr (B&D). Defendant subcontractor B&D in turn hired Dee Cramer (not a defendant) to install the sheet metal ductwork, and hired Insulation, Inc., plaintiff's employer, to insulate the ductwork.

Plaintiff filed suit against defendants Ford, W-3, Boone & Darr, and Integrated Interiors, alleging negligence, premises liability and strict liability. Robert Bedrick, plaintiff's husband, alleged loss of consortium.

A

The Bedrick complaint alleged that before plaintiff performed her insulation work, Integrated Interiors had constructed two drop ceilings below the area where the sheetmetal ductwork was to be installed and insulated. Plaintiffs' complaint alleged that defendants Ford

and W-3 maintained supervisory control over the construction project at all times pertinent, and that Ford authorized the construction and/or placement of the ceilings before the insulation work was completed. The allegations against defendants Ford, W-3, and defendant subcontractor B&D (mechanical system subcontractor hired by W-3) included that these defendants should have known that the placement of the ceilings in the area where plaintiff was required to insulate would create an extremely dangerous work environment because plaintiff was unable to use a scaffold lift to perform the insulation work, and rather, had to work from wooden planks that sat on oily trusses, which created an extremely dangerous work environment and caused or significantly contributed to plaintiff's fall.

Plaintiffs' complaint alleged that defendant subcontractor Integrated Interiors (hired by W-3 to install two ceilings) was responsible for the placement and construction of the drop ceilings; and that notwithstanding that Integrated Interiors had been advised by various employees of Insulation, Inc., as well as other sub-contractors, that the placement of the ceiling prior to the insulation and duct work being completed created an extremely hazardous work environment for those employees working 15 feet above the ground, Integrated Interiors did nothing to correct or eliminate the dangerous conditions it had created.

II

Defendants Integrated Interiors and W-3 filed motions for summary disposition, contending that plaintiff could not establish a causal connection between their conduct and her injuries, and that each owed no duty to plaintiff. Defendants Ford and B&D concurred in the motions regarding the causation issue.

The circuit court granted defendants summary disposition on causation grounds, and did not address the issue of duty. The circuit court denied plaintiffs' motion for reconsideration. This appeal ensued.

A

Plaintiff asserts that the combination of expert and lay testimony plaintiffs presented was sufficient to present a triable issue of proximate cause for the jury. We agree.

This Court reviews de novo the circuit court's grant of summary disposition, considering the available pleadings, affidavits, depositions and other documentary evidence in a light most favorable to the nonmovant, and determines whether the movant is entitled to judgment as a matter of law. *Johnson v A & M Custom Built Homes of West Bloomfield, PC*, 261 Mich App 719, 721; 683 NW2d 229 (2004).

A plaintiff in a negligence case must establish four elements: 1) that defendant(s) owed plaintiff a duty, 2) a breach of that duty, 3) an injury proximately resulting from the breach, and 4) damages. *Hughes v PMG Building Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997). Causation is comprised of cause in fact and legal cause. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). The *Skinner* Court noted regarding causation:

> While the plaintiff bears the burden of proof, the plaintiff is not required to produce evidence that positively eliminates every other potential cause. Rather,

> the plaintiff's evidence is sufficient if it "establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support." [*Skinner, supra* at 159-160, quoting *Mulholland v DEC Int'l Corp,* 432 Mich 395, 415; 443 NW2d 340 (1989).]

The plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct the plaintiff's injuries would not have occurred. *Skinner, supra* at 164-165.

The general rule at common law was that property owners and general contractors are not liable for injuries resulting from the negligent conduct of independent subcontractors or their employees. *Funk v General Motors Corp,* 392 Mich 91, 104-105; 220 NW2d 641 (1974). *Funk*, a seminal case in this area, "set forth a new exception to this general rule of nonliability, holding that, under certain circumstances, a general contractor could be held liable under the 'common work area doctrine' and, further, that a property owner could be held equally liable under the 'retained control doctrine.'" *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48; 684 NW2d 320 (2004), reversing 255 Mich App 165, 180; 660 NW2d 730 (2003).

The law as it stands after *Ormsby, supra,* which was decided during the pendency of this appeal and clarified *Funk*, is:

> To establish the liability of a general contractor under *Funk*, a plaintiff must prove four elements: (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area [*Ormsby*, *supra* at 57, citing *Funk, supra* at 104.]

Ormsby clarified that "common work area" and "retained control" are not separate and distinct doctrines; rather, the retained control doctrine (applicable to property owners) is subordinate to the four-part "common work area" test of *Funk*, and can be applied only when the injured plaintiff can establish all four elements of the "common work area" test. *Ormsby, supra* at 60.

B

We conclude that the circuit court erred by dismissing plaintiffs' claims for failure to establish cause in fact, for several reasons. First, plaintiff is entitled to a presumption of due care. SJI2d 10.09[1]. Defendants do not dispute that plaintiff's fall and resulting injuries (which

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[1] SJI2d 10.09 provides:

> [If you find that / Since] plaintiff has a loss of memory concerning the facts of this case and it was caused by the occurrence, you may infer that the plaintiff was not negligent. However you should weigh all the evidence in determining whether

(continued…)

included a head injury) were the cause of her memory loss, nor do defendants address plaintiff's contention that she is entitled to the presumption of due care under SJI2d 19.09. Documentary evidence obtained during discovery and submitted below supports that plaintiff had no memory of what immediately preceded and caused her fall, although she remembered her actions and the surrounding environment preceding the fall.[2]

Further, no evidence was presented below to support that plaintiff caused her own fall or that she was negligent. In fact, the testimony on the subject pointed to the opposite conclusion: for example, Steve Brown, a Dee Cramer employee working about ten feet from plaintiff at the time she fell, testified that he and his supervisor, Red, had observed how diligent plaintiff and the other insulation workers were regarding tying-off their lanyards.[3] Plaintiff's deposition testimony was that if there was something from which she could tie off her lanyard, she would always tie off, but that she did not know whether she was tied off at the time of her fall. The evidence presented below supports that plaintiff's lanyard was not torn after her fall—which supports that at the time she fell there was nothing to which she could tie off. The circuit court's opinion's statement that plaintiff's being dizzy from medication was as likely to have caused her

(…continued)

the plaintiff was or was not negligent.

The *Comment* section states that "[t]he loss of memory must be related to injuries received in the accident . . . However, medical evidence does not necessarily have to be presented to prove the injury caused the amnesia."

[2] Plaintiff's answers to interrogatories included:

> Plaintiff admits that she has no memory as to what specific condition caused her fall for the reason that the trauma has affected her memory, but she does have a memory of the hazardous and unsafe conditions she was provided to work under. Further, existence of these hazardous and unsafe conditions are amply supported by the testimony of other workers and sub-contractors who were present at the Project on the day of her fall and injury.

[3] Steve Brown testified at deposition that he was within ten feet or so of plaintiff at the time of her fall, but that his back was to plaintiff and he thus did not see what caused the accident. David Rauh, plaintiff's co-employee at Insulation, Inc., testified at deposition that immediately after plaintiff's fall, he ran over to her, asked her whether she remembered what happened to cause her fall, and that plaintiff responded that she fell after "'moving a plank'".

Several days after plaintiff's accident, Rauh drew a diagram of what he saw immediately after plaintiff's fall when he looked up at the ceiling area where plaintiff had been working, and his drawing showed that one of the two planks plaintiff had been standing on was at an angle. Both plaintiff and Steve Brown testified at deposition (and defendants do not dispute) that the steel trusses on which the wooden planks rested were oily and slippery. Brown and plaintiff both testified (and defendants do not dispute) that the lighting in the area Brown and plaintiff were working in was poor, the air was dusty, and that they could not always tie off their safety lanyards. Plaintiff testified that she did not remember whether she was tied off at the time of her fall. She also testified that had there been a structure from which she could tie off she would have, and had she been tied off at the time of the fall, she would not have fallen all the way down to the concrete floor. Brown testified that he did not recall noticing the condition of plaintiff's lanyard after she fell.

fall as any of the hazardous conditions present at the work site has no support in the record. There was no evidence to support that the medication plaintiff was taking had any effect on her whatever during the time she was working at the Ford plant.

Second, plaintiff presented evidence that The Project Timing Schedule, which was incorporated into Ford's contract with W-3 and into W-3's contract with Integrated Interiors, provided that the ductwork [which plaintiff was insulating after Dee Cramer installed it] was to be completed on October 17, 1997. The 14' ceiling was to be installed later, by October 31, 1997, and the 12' ceiling was to be installed by November 14, 1997. It is undisputed that before plaintiff's fall, various subcontractors' employees, including plaintiff (of Insulation, Inc.), and Steve Brown (of Dee Cramer), complained to W-3 and to Integrated Interiors that Integrated Interiors' installation of the ceilings before the ductwork was completed rendered the work dangerous and hazardous. Plaintiff and Brown were working **above** the two interior ceilings--the 12' and 14' ceiling, yet defendant subcontractor Integrated Interiors, installed or partially installed the two interior ceilings before the completion of the ductwork, in violation of the project timing schedule. It is not disputed that defendant subcontractor Integrated Interiors, hired by general contractor W-3 to install the ceilings, installed the ceilings or portions thereof before the ductwork was complete. Further, W-3 was obligated under its contract with Ford to perform work according to a time schedule for each phase of the work, and W-3 contracted with Ford to oversee and supervise this construction project and to enforce safety measures at the site. The project timing schedule was incorporated into W-3's contract with Integrated Interiors as well. Plaintiff testified at deposition and submitted an affidavit below stating that had the ceilings not been installed in reverse sequence, she would have been able to perform her insulation work from her scissor-lift.

We conclude that viewing the evidence submitted in the light most favorable to plaintiff, plaintiff presented sufficient evidence to create a question of fact regarding causation, i.e., that one of the wooden planks she had to use to access the ductwork she was insulating moved or slipped unexpectedly,[1] and that had the ceilings not been installed in reverse sequence, plaintiff could have performed her insulating work as she usually did--from the safety of her scissor lift. None of the defendants dispute that the wooden planks were necessary to plaintiff's reaching the ductwork, nor does any defendant dispute that the wooden planks had to rest on steel trusses which were oily and slippery. Ample evidence was presented that the workers in the area could not tie off at all times when they were working above the 14' ceiling, for lack of structures to tie off to, that they could not work from their scissor lifts when they were between the two ceilings or above either ceiling, that they had to climb onto wooden planks that sat on steel trusses that were oily and slippery to perform their work, and that there was little lighting in the area and the air was dusty.

We conclude that sufficient evidence was presented to support plaintiff's theory of causation, such that proximate cause was a question for the fact-finder.

We decline defendants' invitation to affirm the circuit court's dismissal of plaintiffs' claims on the separate ground of duty. Defendants acknowledge that the circuit court did not address the issue of duty, thus we do not address it. See *Fast Air, Inc v Knight,* 235 Mich App 541, 549; 599 NW2d 489 (1999). We also note that no defendant filed supplemental briefing in this Court addressing how the recent *Ormsby* decision would impact the issue of duty. We therefore leave the issue to the circuit court on remand.

III - **CROSS-APPEAL**

After plaintiffs filed suit, defendant Ford cross-claimed against general contractor W-3 for indemnification, defense costs, and attorney fees under Ford's contract with W-3. The circuit court ruled in July 2002 that, from that point on, W-3 was required to indemnify and defend Ford. The circuit court's ruling that W-3 indemnify and defend Ford is not part of this appeal, however, it is pertinent because W-3's cross-appeal seeks indemnification for attorney fees W-3 has incurred in Ford's behalf and in its own behalf.

General contractor W-3 tendered its defense to subcontractor B&D and subcontractor Integrated Interiors, and to third-party defendant Insulation, Inc. (plaintiff's employer). All three denied W-3's tender. W-3 then filed cross-claims for indemnification against B&D, and Integrated Interiors, and a third-party claim for indemnification against Insulation, Inc. W-3's cross-appeal is from the circuit court's denial of its summary disposition motion as to these contractual indemnification claims, and the court's grant of summary disposition in favor of B&D, Integrated Interiors, and Insulation pursuant to MCR 2.116(I)(2).[4]

W-3 first asserts that the circuit court erroneously found the indemnity provision in B&D and Integrated Interiors contracts with W-3 ambiguous, and erroneously read into the provision two additional prerequisites: first, that W-3 had to establish that plaintiff's injuries were due to *negligent* acts or omissions of B&D and Integrated Interiors; and second, that W-3 must be adjudged vicariously liable for the acts of B&D and Integrated in order for them to have a duty to indemnify W-3. W-3 maintains it is entitled to indemnification for all its losses, including those attributable to its own negligence (unless W-3 is found solely negligent). W-3 also contends that it is entitled to recover its attorney fees under this broadly-worded indemnification provision.

A

We review de novo the circuit court's denial of W-3's motion for summary disposition. *Johnson, supra* at 721. Rules of construction applicable to contracts generally apply to indemnification clauses. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997). An indemnity clause is construed against the drafting party and the party who is the indemnitee. *Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448, 452; 403 NW2d 569 (1987).

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[4] MCR 2.116(I)(2) provides:

> (I) **Disposition by Court; Immediate Trial.**
>
> *** * ***
>
> (2) If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.

One issue considered in *Fischbach, supra,* was whether the indemnity clause violated MCL 691.991, which statute provides:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building . . . purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property **caused by or resulting from the sole negligence** of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable. [Emphasis added.]

The indemnity clause at issue in *Fischbach* stated:

> Section 12. The Subcontractor agrees to and shall indemnify, protect, defend and save harmless Company from and against all liability or claimed liability for injuries, including death, to any and all persons whomsoever and for any and all property damage arising out of or resulting from or in any way connected with the work covered by this Subcontract or the operations or acts of commission or omission of the Subcontractor, his subcontractors, agents and employees. [*Id.* at 450-451.]

In *Fischbach* this Court addressed whether the defendant had to indemnify the plaintiff for plaintiff's own acts of negligence.

> [D]efendant claims that the trial court erred in concluding that Section 12 of the subcontract provides that defendant is to indemnify plaintiff for plaintiff's own acts of negligence. In addressing this issue, we recognize that indemnity contracts are construed strictly against the party who drafts them and against the indemnitee. However, it is also true that indemnity contracts should be construed so as to give effect to the intentions of the parties. In ascertaining the intentions of the parties, one must consider not only the language used in the contract, but also the situation of the parties and circumstances surrounding the contract.
>
> The additional rule of construction, imposed in earlier cases in this Court, that indemnification contracts will not be considered to indemnify the indemnitee against losses from his own negligent acts unless such an intent is expressed in the contract language itself in clear and unequivocal terms, no longer applies. This Court has concluded that **broad, all-inclusive indemnification language may be interpreted to protect the indemnitee against its own negligence** if such intent can be ascertained from other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties. Thus, although an indemnity provision does not expressly state that the indemnitee will be shielded from its own negligence, such language is not mandatory to provide such indemnification.
>
> In *Paquin v Harnischfeger Corp,* [113 Mich App 43, 52; 317 NW2d 279 (1982),] the Court cited the general rules of construction as described above in addressing whether an indemnification clause which broadly protected the indemnitee from

"all claims, loss, expense, damage and liability" provided protection to the indemnitee for its own negligence as a matter of law. In ascertaining the intention of the parties, the *Paquin* Court relied on two separate and independent reasons for finding that the parties intended that the indemnification provision would protect the indemnitee from liability caused by its own negligence. The Court first noted that the indemnification provision expressly provided that the indemnitee would not be protected if the injury or damage was caused by its sole negligence in order to avoid a violation of MCL 691.991; MSA 26.1146(1). The *Paquin* Court concluded that this limitation indicated an intent to provide indemnity in all situations involving the indemnitee's own negligence except when the indemnitee's negligence was the sole cause of the injury or damage.

The first basis relied on by the *Paquin* Court to find that the parties intended to indemnify the indemnitee for its own negligence does not apply in the within case, since no clause specifically excluding injuries or damages caused by plaintiff's sole negligence is included in the indemnification provision involved herein. However, the *Paquin* Court went on to find that the situation of the parties and the circumstances surrounding the contract also indicated that indemnification for the indemnitee's own negligence was intended. The *Paquin* Court supported this conclusion by noting that it was understood at the time the contract was entered into that the employees of both the indemnitee and indemnitor would be working in the same area and that the use of a crane would be shared. Thus, the possibility that an injury or damage would result from the indemnitee's negligence was apparent. In addition, the *Paquin* Court noted that the indemnitor was a substantial company with between twenty-five and one hundred employees and that the company officer in charge of preparing bids was familiar with this type of indemnification provision.

This second basis used by the *Paquin* Court to ascertain the intent of the parties to indemnify the indemnitee for his own negligence is directly applicable in this case. Section 3 of the contract between plaintiff and defendant, as well as addendum No. 1 of the contract, clearly indicate that all the work connected with installing the machine would not be performed by defendant, and that the employees of plaintiff and other subcontractors would be present at the common work area. Thus, as in *Paquin*, the possibility that an injury or damage would result from plaintiff's negligence was apparent at the time the parties entered the contract providing for indemnification.

Furthermore, we note that defendant's president signed the contract and that defendant has not made any claim that the contract was unconscionable in any way or that the parties had significantly disparate bargaining power. In fact, despite the nine-month opportunity for discovery provided by the trial judge in this matter, defendant has not conducted any discovery which would possibly rebut an inference that the parties intended to indemnify plaintiff for its own negligence.

Therefore, we conclude that the situation of the parties and the circumstances surrounding the contract reveals [sic] that the parties intended that plaintiff be

> indemnified for damages or injuries caused by its own negligence. The language of the indemnity provision is broad and clear, encompassing *all* liability for injuries, including death and all property damage. In light of the situation surrounding the parties and the contract in this case, we find that the trial judge did not err in concluding that, as a matter of law, no ambiguity exists concerning the intent of the parties to indemnify plaintiff for its own negligence. [*Fischbach, supra* at 452-455 (Emphasis added).]

An indemnitee that is found to be comparatively negligent with others for the injury may enforce an indemnity provision, since, if comparatively negligent with others, the indemnitee is not solely negligent. *Fischbach-Natkin, supra*; see also *Sherman v DeMaria Bldg Co Inc*, 203 Mich App 593, 596-601; 513 NW2d 187 (1994). An indemnification clause that provides the indemnitee with protection from its own negligence, in the situation where the injury is not the result of the sole negligence of the indemnitee, does not violate MCL 691.991; *Fischbach, supra* at 461; *Sherman, supra* at 601.

B

W-3's contracts with B&D and Integrated Interiors both have the same indemnification provision, which states:

> HOLD HARMLESS: The Subcontractor shall indemnify and save harmless W-3 CONSTRUCTION CO. and its employees or agents from and against all losses and claims, demands, payments, suits, actions, recoveries and judgements of every nature and description brought or recovered against W-3 Construction Co. by reason of any act or omission of the said subcontractor, his agents or employees in the execution of the work or in the guarding of it.

We conclude that the circuit court's blanket dismissal of W-3's indemnification claims was error, for several reasons. First, the cases instruct that in ascertaining the parties' intent, one must consider not only the language used in the contract, but also the situation of the parties and circumstances surrounding the contract. *Fischbach, supra; Paquin, supra.* The circuit court's opinion stated this proposition, but did not give it much heed.

The instant indemnity clause is broadly worded: B&D and Integrated Interiors agreed to indemnify W-3 for "all losses and claims, demands, payments, suits, actions, recoveries and judgements of every nature and description brought or recovered against [W-3] by reason of any act or omission of the said subcontractor, his agents or employees in the execution of the work or in the guarding of it."

Regarding the circumstances surrounding the contract and the parties' situation, as in *Fischbach*, the nature of the construction project in the instant case [installation of ductwork, insulation of the ductwork and installation of two ceilings] was such that "it was understood at the time the contract was entered into that the employees of both the indemnitee and indemnitor would be working in the same area." *Fischbach, supra* at 454. Thus, the possibility that an injury or damage would result from W-3's negligence was apparent at the time the parties entered the contract providing the indemnification. *Id.*

In sum, the circumstances surrounding the contract, and the broad language of the indemnity provision, support that W-3 is entitled to indemnification. The circuit court focused heavily on W-3's having submitted scant documentary evidence regarding the "intention of the parties." We conclude that, given the construction context, the circumstances surrounding the contract say as much or more than would an affidavit of an individual regarding what the signators contemplated at the time of contracting.

Moreover, the circuit court's determination that since plaintiffs' claims were dismissed on summary disposition, W-3 "having not been held liable, is not entitled to indemnification for any loss in connection with plaintiff's suit," is erroneous. The indemnity provision expressly states that W-3 is to be indemnified for "all losses and claims, demands, payments, suits, actions, recoveries and judgements of every nature and description **brought or recovered** against W-3 Construction . . ." [Emphasis added.] Clearly, an action has been "brought" against W-3 by plaintiffs, and plaintiffs alleged negligence all the way down the line, from the property owner (Ford), general contractor, sub-contractors and sub-subcontractor. The indemnity provision by its plain terms covers actions brought against W-3.

The circuit court read into the indemnity provision that W-3 had to be adjudged vicariously liable in order to be entitled to indemnification, and that the indemnity provision's phrase "any act or omission" must mean any negligent act or omission, when the provision's plain language says nothing about either.

We conclude that the indemnity provision's broad language and the circumstances surrounding the contract are such that these subcontractors, B&D and Integrated Interiors, have a duty to indemnify W-3 (except under the circumstance that W-3, solely, is found negligent).

On the question whether W-3 is entitled to indemnification by B&D and Integrated only to the extent of their own negligence, or for their own negligence *and* W-3's own negligence, we conclude that the broad wording of the indemnity provision, which uses the term "any" and "all," and does not limit the subcontractors' duty to indemnify to the subcontractors' comparative share, supports that W-3 is entitled to indemnity for its own negligence, as well as B&D's and Integrated Interiors'.

ATTORNEY FEES

W-3 also maintains on cross-appeal that it was entitled to recovery of its attorney fees under the indemnity provision, including those it incurred on Ford's behalf pursuant to its indemnity contract with Ford. We agree.

The general rule regarding assessment of attorney fees in an indemnity action is that an indemnitee may recover "necessary defensive fees." *Redfern v R E Dailey & Co,* 146 Mich App 8, 19; 379 NW2d 451 (1985). In *Redfern*, the indemnity provision stated that the indemnitor would indemnify and save harmless the indemnitee "against all claims, liabilities, losses, damages **and expenses of every character whatsoever**." *Id*. (emphasis in original) This Court concluded that attorney fees were encompassed. *Id.* The following year, this Court in *Beaudin v Michigan Bell Telephone Co,* 157 Mich App 185; 403 NW2d 76 (1986), ruled that the following indemnification provision did not entitle Michigan Bell to indemnification for defense costs:

> The customer indemnifies and saves the Company harmless against claims for libel, slander . . . claims for infringement of patents . . . ; and **against all other claims arising out of any act or omission of the customer in connection with facilities provided by the Company.** [*Id.* at 186-187. (emphasis added).

We conclude that the indemnity provision at issue here is more like the provision in *Redfern* than the provision in *Beaudin.* The unpublished case the circuit court relied on is not binding, and did not properly interpret *Beaudin.* We reverse the circuit court's denial of attorney fees to W-3.

IV

W-3's final claim on cross-appeal is that the circuit court erred in holding that Insulation, Inc., did not have a duty to indemnify W-3. W-3 asserts that the circuit court mistakenly found that the terms of the subcontract executed by B&D and Insulation, Inc., did not incorporate the terms of the subcontract executed by B&D and W-3.

A

The factual context pertinent to W-3's indemnification claim against Insulation, Inc. (plaintiff's employer) differs from that of B&D and Integrated Interiors. B&D and Integrated Interiors both had contracts with general contractor W-3, who hired them both. However, W-3 did not contract directly with Insulation, Inc. Rather, subcontractor B&D hired Insulation, Inc., to install insulation.

The agreement between B&D and Insulation, Inc., is on B&D letterhead and is entitled "SUBCONTRACT AGREEMENT." Page one of the two-page subcontract agreement states that B&D is thereafter referred to as the "Contractor," and Insulation, Inc., as the "Subcontractor." Page two states:

> All elements of the contract documents are herein made a part of this subcontract, including the following.
>
> 1. ADDENDUM TO SUBCONTRACT ATTACHED IS PART OF THIS AGREEMENT.
>
> 2. REVISED BOONE & DARR SAFETY POLICY MUST BE ADHERED TO.
>
> 3. FURNISH CERTIFICATES OF INSURANCE PRIOR TO STARTING WORK
>
> * * *
>
> 6. ATTACHMENT "B" – PRELIMINARY SCHEDULE 2-18-97
>
> * * *

Item 1, addendum to the subcontract, states in pertinent part:

> This contract includes the general conditions, specifications and drawings, and all addenda thereto, (hereinafter collectively called Owner's contract) of the contract, or relating to work to be performed under the contract, between Owner and Boone & Darr, inc. as if herein set forth. . . . . In performance of this contract the Subcontractor assumes toward Boone & Darr, Inc. all the obligations that Boone & Darr, Inc. assumes toward the Owner and Boone & Darr, m Inc [sic] shall have all the rights and remedies as to said Subcontractor which the Owner has as to Boone & Darr, Inc. under any of the documents referred to in this paragraph.

The indemnity provision at issue is contained in the same Addendum to the Subcontract, and provides:

> Subcontractor will protect, defend, indemnify and save harmless Owner and/or Boone & Darr, Inc. and their employees or agents from and against all losses, claims, demands, payments, damages, suits, actions, attorney's fees, recoveries and judgments of every nature and description brought or recovered against the Owner and/or Boone & Darr Inc. caused by or on account of any act or omission, negligent or not negligent, of Subcontractor, his agents, employees, or subcontractors, in the course of or in connection with work done under this contract. Subcontractor shall indemnify and save harmless Owner and/or Boone & Darr, Inc. from and against all losses; claims, demands, payments, damages, suits, actions, attorney's fees recoveries and judgments of every nature and description brought or recovered against Owner and/or Boone & Darr, Inc. by employees or agents of Subcontractor or of subcontractors of Subcontractor, caused or arising in any manner whatsoever, in the course of or in connection hereunder and regardless of the person or persons, including Boone & Darr, Inc. and Owner, whose act or omission to act, whether negligent or not negligent, causes, results in or contributes to such loss, claim, demand, payments, damages, suit actions, attorney's fees recovery or judgement. This indemnity shall include any fees, expenses or sums spent in compromise of any claim included hereunder.

The B&D / Insulation, Inc. subcontract also provides:

> 2. This contract includes the general conditions . . . of the contract . . . between Owner and Boone & Darr, Inc. as if herein set forth . . .
>
> Subcontractor assumes toward Boone & Darr Inc. all the obligations that Boone & Darr, Inc. assumes toward the Owner, and Boone & Darr, Inc. shall have all the rights and remedies as to said Subcontractor which the Owner has as to Boone & Darr, Inc. under any of the documents referred to in this paragraph.

B

The circuit court accepted Insulation's argument that the indemnity provision in its contract with B&D obligated it (Insulation) to indemnify **Ford**, rather than W-3. W-3 argues that this was error because B&D did not have a contract with Ford, thus it would be impossible to incorporate the terms of a non-existent contract.

W-3 is not a party to this contract**,** and thus had no hand in its drafting. Confusingly, W-3 maintains on appeal that the contract is unambiguous, but then argues for an interpretation of the term "Owner" other than its plain meaning, and cites no authority to support its argument, nor does it cite to the record in support of this argument. In sum, W-3 has not supplied authority or advanced reasons warranting reversal of the circuit court's denial of its indemnification claim against Insulation, Inc. Under these circumstances, we affirm the circuit court's denial of W-3's indemnification claim against third-party defendant Insulation, Inc. We reverse the circuit court's dismissal of W-3's remaining indemnification claims.

In the principal appeal, we reverse the grant of summary disposition to defendants and remand. In W-3's cross-appeal, we affirm the dismissal of Insulation, Inc., and reverse in all other respects. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Helene N. White
/s/ Michael J. Talbot